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DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

SOUTHERN RY. CO. v. JONES.

Jan. 17, 1907.

[56 S. E. 155.]

1. Railroads—Operation—Accidents at Crossings—Obstructions—Care Required.—Where the view of a traveler on a highway crossing a railroad was obstructed by a rick of cordwood near the railroad crossing, a higher degree of care was imposed upon such traveler, and also upon the railroad company, than if the obstruction had not existed, the degree of caution required by both parties being in proportion to the danger caused by the obstruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 981, 1057-1070.]

2. Same—Contributory Negligence—Failure to Look and Listen—Negligence of Company—Sounding Whistle.—Where a traveler on a highway, after stopping and looking for an approaching train at a distance of 75 feet from a crossing where he could not look down the track because of an obstruction, did not again look or listen until he was on the main track, where he was struck by a train, though for at least 40 feet before arriving on such track he could have looked down the railroad a distance of over 700 feet, he was guilty of contributory negligence, precluding his recovery for his injury, even though the company was negligent in failing to sound a whistle as required by Acts 1893-94, p. 827, c. 737.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1087, 1061.]

TROUT et al. v. PRATT.

Jan. 17, 1907.

[56 S. E. 165.]

1. Wills—Construction—Estates Devised.—A testator gave all his property to his wife, to be used by her for the mutual benefit of herself and children, and declared that on her remarriage she should take only what the law allows a widow, and that it was desired that she should make advances to the children as circumstances might require, so that they should enjoy an equal degree of the estate, taking care not to so diminish the estate during her life as to deprive it of an income sufficient to render herself and those of the children who might be with her independent, and that after

her death the estate should be equally divided among the children, each one to account for any advances. Held, that the wife acquired absolutely during her widowhood a right to the whole of the rents and income of the estate.

2. Same—Disposition by Devisee—Authority.—The testator nominated the wife executrix, but she declined the office. Held, that the wife thereby did not surrender any of the powers given to her under the will, except those relating to the office of executrix.

3. Same—Testamentary Powers—Exercise—Control by Equity.—A testator gave all his property to his wife, to be used by her for the mutual benefit of herself and children, and provided that he desired her to make advances to the children as circumstances might require, so that they should enjoy the estate in equal degree. Held, that the mere fact that the wife saw fit to make an advancement to one child did not create a right in all the children to demand an equal advancement, which a court of equity could enforce, and in the absence of fraud on the part of the wife, or proof that she was acting in bad faith, equity would not interfere in the exercise of her discretion as to advancements.

STROTHER'S ADM'X *v.* STROTHER et al.

Jan. 17, 1907.

[56 S. E. 170.]

1. Equity—Bill—Multifariousness—Personal Claim—Claim as Administrator.—A bill brought to recover a claim in complainant's own right against a partnership of which complainant was a member and a claim as administrator against the same partnership is not multifarious.

2. Same.—A bill is not multifarious because one of two demands is a legal one, unless the causes of actions are wholly distinct and each one is sufficient as stated in the bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 346.]

3. Same—Remedy at Law—Action by Partner against Partnership.—A debt due complainant as administrator by a firm of which he is a member is one which cannot be recovered at law; for one cannot be both plaintiff and defendant in an action at law, nor can an action be brought against certain members of a partnership on a contract entered into by the firm.

4. Appeal—Grounds of Review—Presentation in Lower Court—Ground for Demurrer.—No ground for demurrer, not assigned in the trial court, can be considered on appeal, except where the trial court has no jurisdiction of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1223.]